OMEX SHIPPING CO. LTD. v. WORLD AERO SUPPLIES PTE. LTD. & ANOR.

[A.C.J. (Chan Sek Keong J.C.) July 15, 1986]

[Singapore – Suit No. 1937 of 1983]

Practice and Procedure – Defence not filed and served – Court vacation – Effect of on the filing and serving of defence – R.S.C. 1970, O.18 r.5 & O.19 r.2(1).

This was an appeal from the decision of the Assistant Registrar who allowed judgment in default of defence against the second defendant. The issue before the court was whether the plaintiff on December 27, 1985 was entitled under Order 19 rule 2(1) to enter judgment against the second defendant for failing to file its defence during court vacation.

Held, allowing the appeal: Order 18 rule 5 prohibits a defendant from serving his defence during court vacation and Order 19 rule 2 does not enable the plaintiff to enter judgment for default in the filing of the defence.

Cases referred to:

(1) *MacFoy* v. *United Africa Co. Ltd.* [1962] A.C. 152.
(2) *The Clifford Maersk* [1982] 3 All E.R. 905.

CIVIL SUIT.

Harish Kumar for the 2nd defendant/appellant.

Eddy Teng for the plaintiff/respondent.

Cur. Adv. Vult.

Chan Sek Keong J.C.: The main issue in this appeal involves a short but unusual point of procedure and bears upon the meaning and effect of certain rules in O.18 and O.19 of the Rules of the Supreme Court, 1970.

On November 26, 1985, the 2nd defendant's solicitors, who were in default since October 25, 1985 in serving the defence on the plaintiff, received a telex from the plaintiff's solicitors enquiring whether the defence would be filed as a considerable time had elapsed since appearance was entered and stating that the defence ought to be filed by November 29, 1985. On November 28, 1985, the 2nd defendant's solicitors requested for extension of time until the end of December 1985 to file the defence as the solicitor in charge of the matter was then on leave. The plaintiff's solicitors on November 30, 1985 (which was a Saturday) refused this request and required the 2nd defendant to file its defence before the close of December 3, 1985 failing which the plaintiff would enter judgment in default of defence. On December 2, 1985, the 2nd defendant's solicitors replied that their client need not file the defence in December as the court was in vacation [from December 2, 1985 until January 3, 1985] and referred to O.18 r.5. The plaintiff's solicitors replied on December 2, 1985, reiterating that the defence was long overdue and stating that they were aware of the effect of O.18 r.5 and that the court vacation did not cut across the running time of the defence. The 2nd defendant's solicitors then replied on December 3, 1985 to reiterate their view that the effect of O.18 r.5 was clear and that the 2nd defendant need not file its defence during the court vacation.

On December 27, 1985, the plaintiff's solicitor *viz.* Eddy Teng Jong Pu, filed an affidavit in which he exhibited copies of the correspondence referred to in the preceding paragraph; he deposed that he had caused a search to be made in the cause book in this action and had ascertained that no defence had been filed and served and prayed for judgment to be entered in favour of the plaintiff. Judgment was so entered on that day.

On December 31, 1985, the 2nd defendant took out an application to set aside the default judgment on the ground that it was obtained in contravention of O.18 r.5. The application came on for hearing on February 7, 1986 before the Assistant Registrar who dismissed the application with costs. On the same day, the 2nd defendant filed a notice of appeal against the decision of the Assistant Registrar. On March 17, 1986, the 2nd defendant succeeded in obtaining an order to stay execution on the default judgment.

The issue before me was whether the plaintiff, on December 27, 1985, was entitled under O.19 r.2(1) to enter judgment against the 2nd defendant for failing to file its defence during court vacation. Counsel for the 2nd defendant contended that the plaintiff was so not entitled because O.19 r.2(1) applied only to a failure to serve the defence and not to a failure to file the defence, and that the 2nd defendant had not failed to serve its defence because O.18 r.5 prohibited it from doing so.

Counsel also referred me to O.18 r.21 [which provides that "every pleading must be filed in the Registry"] and submitted that the function of this rule, which is peculiar to Singapore and Malaysia, is to ensure that the Registry has a file in each action with all the relevant pleadings – see note to O.18 r.21 in Mallal's Supreme Court Practice 2nd ed. at p. 227.

Counsel for the plaintiff contended that the plaintiff was on December 27, 1985 entitled to enter judgment in default of defence because (a) the defence was long overdue prior to the commencement of court vacation, and (b) the defence had not been filed notwithstanding his notice requiring the 2nd defendant's solicitors to file it. It was further contended that O.19 r.2 allowed the plaintiff to enter judgment in the circumstances of this case because the 2nd defendant must, in order to serve its defence, file it first.

At the end of the hearing before me, I allowed the appeal with costs. I now give my reasons. It will be convenient to set out herein the relevant rules of court.

(a) O.18 r. 5:
"5. Pleadings shall not be served during the Court Vacation except with the leave of the Court or with the consent of all the parties to the action."

(b) O.19 r.2(1):
"2(1) Where the plaintiff's claim against a defendant is for a liquidated demand only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any."

The words of O.18 r.5 are clear. No pleading *shall* be served during this period except with the leave of the Court or with the consent of all the parties to the action. When read with O.3 r.3, it has the effect of stopping time from running in respect of the filing and serving of pleadings. So are the words of O.19 r.2(1).

Counsel for the plaintiff contended that if the 2nd defendant had not filed its defence, it could not have served it on the plaintiff. That is very true. But the relevant rule penalises a defendant for not serving his defence and not for not filing his defence. All the relevant rules in Order 18 and 19 refer to service of or failure to serve pleadings (except for O.18 r.21, the function of which has been noted earlier). Where the defendant is prohibited by a rule of court to serve his defence during court vacation, he cannot be said to have failed to do so by not filing it or by not serving it. To what purpose is the filing of the defence since no legal consequence could follow from its omission to do so? Not only does O.18 r.5 prohibit a defendant from serving his defence during court vacation, O.19 r.2 also does not enable the plaintiff to enter judgment for default in the filing of the defence.

Plaintiff's counsel sought to argue that reading O.19 r.2 literally, the plaintiff was justified in entering judgment because the 2nd defendant had in fact failed to serve its defence on the plaintiff prior to the commencement of court vacation. I could not accept this argument: it was never the plaintiff's intention as communicated to the 2nd defendant's solicitors that the plaintiff would enter judgment for a default prior to the commencement of court vacation if the 2nd defendant did not file its defence by December 3, 1985. The telex sent by plaintiff's counsel to the 2nd defendant's counsel was as follows: "Please file Defence before close of December 3, 1985 failing which we shall have no alternative but to enter judgment in default of defence." i.e. in default of filing the Defence on December 3, 1985 and not in default of serving the Defence on or between November 26, 1985 and November 29, 1985. This interpretation is supported by the view taken by plaintiff's counsel in a subsequent telex that O.18 r.5 did not cut across the running time of the defence. Even if I were wrong in adopting this interpretation, the telex of the plaintiff's solicitors misled the 2nd defendant's solicitors and the plaintiff should not be allowed to take advantage of this.

In the course of his submission, counsel for the plaintiff referred me to the Privy Council decision in *MacFoy* v. *United Africa Co. Ltd.*[1] which he contended, supported his view of the law. In that case, the Privy Council had refused to set aside a judgment in default of defence. The issue before the Privy Council was whether a statement of claim which was filed during court vacation (contrary to a procedural rule which provided that "pleadings shall not be .... delivered or filed during .... such vacation, unless by direction of the court or a Judge") was a nullity or an irregularity. The Privy Council held that the filing of the statement of claim during court vacation was an irregularity (and therefore voidable only) and not a nullity (and therefore void), and that the irregularity not having been avoided, there was no ground on the facts for interfering with the decision of the court below in refusing to set aside the default judgment. There is nothing in the judgment of the Privy Council in *MacFoy's* case which supports the plaintiff's case.

Plaintiff's counsel also contended that if the 2nd defendant had filed its defence, as stipulated by him in his telex, the plaintiff would not have been able to enter judgment in default of defence. I could not see why this was so since, but for the effect of O.18 r.5, O.19 r.2 would not have pre-

vented him from so doing. Neither could I see the purport of his argument since it did not follow as a matter of course that if the 2nd defendant had not filed its defence (as was the case here) the plaintiff would be entitled to enter judgment in default.

In my view, the plaintiff's solicitors, having agreed to give time to the 2nd defendant's solicitors to file the defence during Court vacation and then discovered to his dismay that the rules of court operated to the disadvantage of their client, should not be allowed to resile from their position. They need not have given the indulgence to the defendant, but they did.

The matter can be considered from another point of view. By giving time to the 2nd defendant until December 3, 1985 to file its defence, the plaintiff had consented to extend time for the purpose of O.3 r.5(3). The effect of such extension willy nilly brought into operation O.18 r.5. Support for this approach can be found in the decision of Sheen J. in *The Clifford Maersk*[2] where he held that an agreed time limit which expired on a day when the court offices were closed extended to the next ensuing day on which the offices were open.

As the appeal on the main point has been allowed, it becomes unnecessary for me to decide whether the 2nd defendant was entitled to raise before me the argument that the default judgment should be set aside on the merits when this ground of appeal was not argued before or considered by the Assistant Registrar and also an affidavit on the merits was not filed at the relevant time but was filed only to support the application for stay of execution of the judgment.

Appeal allowed.

Solicitors: *Haridass Ho & Partners; Prakash, Gurbani & Chong.*

ORDER OF COURT

BEFORE THE HONOURABLE JUDICIAL COMMISSIONER, MR. CHAN SEK KEONG IN CHAMBERS

UPON THE APPLICATION of the abovenamed 2nd Defendants made by way of Notice of Appeal to Judge in Chambers dated 7th February, 1986 and coming on for hearing this day *AND UPON HEARING* Counsel for the Plaintiffs and for the 2nd Defendants *IT IS ORDERED THAT:*

1. The Judgment obtained herein by the Plaintiffs against the 2nd Defendants in default of defence be set aside.

2. The costs of and incidental to this application and in the Court below be taxed and paid by the Plaintiffs to the 2nd Defendants, such costs being limited to the point as respects Order 18 Rule 5 and Order 19 Rule 2 of the Rules of the Supreme Court, 1970.

3. There be a stay of execution on the costs awarded to the 2nd Defendants until the disposal of the Plaintiffs' appeal, if any, to the Court of Appeal.

4. The 2nd Defendants do file their Defence within 14 days of the date hereof.

Dated 15th July, 1986.

Sd.

ASST. REGISTRAR

PAC-ASIAN SERVICE PTE. LTD. v. WESTBURNE INTERNATIONAL DRILLING LTD.

[O.C.J. (Rajah J.) August 22, 1986]

[Singapore – Suit No. 5436 of 1982]

Shipping Law – Contract to move rig – Whether damaged barge seaworthy to fulfil contract – Claim for damages for repudiation.

Contract – Contract to move rig – Whether damaged barge seaworthy to fulfil contract – Repudiation – Claim for damages.

The plaintiffs were a Singapore registered company carrying on, *inter alia*, the business of shipowners, charterers and shipping operators. The defendants were an international drilling company and work as drilling contractors for several major oil companies in South East Asia. At the relevant time, that is in 1979 and 1980, they were drilling for Union Oil and then British Petroleum (BP) in Indonesian waters, more particularly at Sulawesi and Kalimantan, respectively. In February 1980 the defendants had a contract with BP to transport their rig (the Rig) from Sulawesi to Kalimantan. They were about to complete their drilling contract for BP at Sulawesi and were desirous of moving the Rig on a barge from Sulawesi to Kalimantan to fulfil the contract with BP and there to drill for Union Oil. The Rig would be free and ready for removal on March 15, 1980. The defendants therefore on February 19, 1980 invited the plaintiffs and others to bid for the removal of the Rig.

On February 28, 1980 the plaintiffs and defendants agreed that the plaintiffs would provide a tug and a barge to tow the Rig from its position in South Sulawesi. On March 5, 1980, the plaintiffs informed the defendants that the tug "Expert" and the barge "Orchid XI" were ready. On receipt of the information as to the name of the tug and barge the defendants got in touch with their surveyors, the Salvage Association as to the suitability of the vessel Orchid XI for the operation.